IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. AMD 03-0182
	:	
MARVIN WOOTEN	:	

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FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING MOTION TO SUPPRESS IDENTIFICATION EVIDENCE

On April 15, 2003, the grand jury indicted defendant Marvin Wooten on one count of possession of a firearm, a 9mm Parabellum semi-automatic pistol, after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). The indictment arises from Wooten's alleged commission in Baltimore City of an armed robbery *using* the firearm.[1] Wooten timely moved to suppress any in-court and out-of-court identifications by the two robbery victims intended to be offered at trial by the government. The court held an evidentiary hearing on October 17, 2003, October 21, 2003, and, the court having granted permission to the government to reopen its case-in-chief on the motion, on November 26, 2003.

At the initial hearing sessions, the government presented the testimony of the investigating Baltimore City Police detective, Alan Savage, and the robbery victims, Deanna

[1]The serial number on the pistol had been obliterated. Apparently, and remarkably, Wooten was never tried on the charge of armed robbery, which most fair-minded citizens of Maryland would regard as a more serious, morally condemnable offense, than mere possession of a firearm, the sole charge in this case. This raises interesting issues of federalism that are, of course, well outside the province (and perhaps even the competency) of this court to address.

Morgan and Jenelle Henderson.[2] Upon the reopening of the record, the government presented the testimony of the police officer who initially responded to the robbery report, Osiris Lofton.

At the conclusion of the hearing, in an oral opinion from the bench, the court granted the defendant's motion to suppress the actual out-of-court identification by Ms. Henderson, as well as any prospective in-court identification by Henderson. Tr. at 332-33. At the parties' request, the court approved a schedule for supplemental briefing on the remaining factual and legal issues. For the reasons stated on the record, and on the basis of the findings of fact and conclusions of law set forth herein, the court shall, by separate order, grant the defendant's motion to suppress *all* out-of-court and in-court eyewitness identification evidence.

I. Findings of Fact

Wooten is charged with possession of a firearm in violation of 18 U.S.C. § 922(g)(1) stemming from his alleged commission of the armed robbery of Ms. Morgan and Ms. Henderson.

On the evening of September 23, 2002, Morgan and Henderson were at the "Roots Bar," located in an inner-city West Baltimore neighborhood. Henderson, a 17- or 18-year-old high school student at the time, was accompanying Morgan, who had befriended her on some prior occasion. Upon leaving the bar in the early morning hours of September 24,

[2]At the request of the defense, the court permitted Wooten to absent himself from the courtroom during the motion hearing.

2002, the women were robbed by a "black male wearing a blue sweatshirt."

Morgan and Henderson offered divergent accounts of the circumstances under which the robber initially approached them. Morgan testified that the man approached her outside of the bar near the middle of the street where her car was parked. *Id*. at 132. Henderson testified that the robber was already pointing the gun at Morgan's head as Morgan left the bar. *Id*. at 146. Once outside, the man held a handgun to Morgan's head and told her to "kick it out." At that point, Morgan was on her cellular phone, which she was holding with her right hand. *Id*. at 181. The robber then discharged his weapon into the air at least once.[3] Morgan and Henderson gave the man their purses[4] and he fled. There were as many as five people outside of the bar at the time of the robbery, *id*. at 178, but no witnesses have ever stepped forward. As the women were being robbed, the onlookers said "[s]top, Short, stop." *Id*. at 179.[5]

After the robbery, Morgan was unable to connect to the police by phone but she soon encountered Officer Lofton close to the scene. Both Henderson and Morgan testified that Morgan flagged down Lofton a few blocks away from the bar. *Id*. at 85, 182. However, Lofton testified that he was in fact at the scene of the robbery, in front of the Roots Bar,

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[3]Morgan testified as to one shot, Tr. at 82, 137, whereas Henderson claims two shots were fired. *Id*. at 148, 179.

[4]Allegedly, the robber initially took Morgan's phone and keys but gave them back to her. *Id*. at 181.

[5]There is no evidence in the record that Wooten's nickname or street name is or was "Short."

when the women pulled up in Morgan's car. *Id*. at 271. Lofton had gone to the scene in response to an anonymous call reporting shots being fired.

Although Morgan testified that both she and Henderson had only two drinks at the bar, *id*. at 81, when she reported the robbery to Lofton, she began by stating, "I just spent a lot of money in that bar, and I'm not from this side of town." *Id*. at 276-77. Lofton then spent 30-40 seconds calming the women down. *Id*. at 277. He proceeded to interview them for 20-25 minutes, asking both for a description of the assailant. In particular, he asked about the robber's height, weight, complexion, clothing and distinctive features. *Id*. at 283, 292-95. In response, Morgan and Henderson simply described the robber as "an unknown black male wearing a blue sweatshirt." *Id*. at 279.

Lofton completed his report within an hour of interviewing the women in accordance with Baltimore Police Department procedures. *Id*. at 279-80. The report was forwarded to the criminal investigation division and the case was assigned to Detectives Savage and Kazmaier. Two days after the robbery, on September 26, 2002, the detectives received leads in connection with a series of narcotics raids near the Roots Bar. These leads suggested that two individuals, one known as "Tito" and one known as "Michael Bonner," each participated in the robbery. *Id*. at 20, 47, 196.

The detectives first identified Michael Bonner[6] and constructed a photo array that

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[6]Michael Bonner's nickname is "Geeta." *Id*. at 37. His alleged role in the robbery remains unclear. At the scene, the women described only one man as committing the robbery. However, as discussed in text, later they told the detectives that Geeta-- with whom the women had some (continued...)

included his picture. *Id*. at 50. On September 26, 2002, at 12:30 p.m., the detectives went to Morgan's workplace to interview her and to show her a photo array containing Bonner's picture. *Id*. at 34, 95-97. During the interview, Morgan further described the robber as a man in his "mid-20s" and "tall, slender and slinky," with a "medium brown" complexion. *Id*. at 22. For the first time, she stated that on the night of the incident, the robber was at the Roots Bar drinking from his own bottle of Remy Martin®. *Id*. at 22. She also provided the detectives with two telephone numbers for a person named "Geeta," whom she acknowledged was at the bar and on the scene of the robbery. *Id*. at 34-35.

The detectives next interviewed Henderson by telephone. *Id*. at 40. Henderson described the robber as 6'2" tall, 190-195 pounds, with light-to-medium brown skin and she mentioned the Remy Martin® bottle. She also gave the detectives a phone number and a description of Geeta. Def. Exh. 1 & 10. Morgan had Geeta's telephone number on the night of the robbery, but did not give it to the police until she was interviewed on September 26, 2002, two days later. *Id*. at 100.

The detectives also determined that the individual known as "Tito" was defendant Marvin Wooten. Wooten has distinctive facial features that call to mind the cartoon character "Donald Duck." The detectives located and arrested Wooten for "loitering" and brought him

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[6](...continued)
sort of relationship-- was at the Roots Bar on the night of the incident and was exchanging phone numbers with Henderson at the time of the robbery. *Id*. at 35, 40, 45. In spite of this substantial contact with Geeta, incredibly, neither victim identified Geeta in the photo array--although both provided the police with Geeta's telephone number. *Id*. at 39-45, 100-01, 178-79.

to the Western District police station. *Id*. at 56, 58. Savage created two "six pack" photo arrays containing Wooten's photograph, using computerized files of arrest photos, and five other individuals ("look-alikes").[7] Savage claimed he selected the "look-alikes" based on similar "facial and hair characteristics." *Id*. at 12. In fact, Wooten's skin complexion in the computerized photo is, as the government admits, quite inaccurate. Specifically, Wooten is shown to be far darker than he is in fact. Of even greater importance, he is shown to be far darker than any of the five "look-alikes." Govt. Exh. 1 & 2. In one array, Savage put Wooten's photo in the center of the array in the top row: position number two[8]; in the other array, he put Wooten's photo in the center on the bottom row: position number five. The effect of Savage's construction of the arrays is dramatic: Wooten's photo is of a person who bears an unmistakable resemblance to "Donald Duck," and whose skin is noticeably darker than that of the skin of the individuals depicted in all the other photos surrounding it.

Later on September 26, 2002, sometime after 8:30 p.m., the detectives called Morgan and Henderson and asked that they report to the Western District police station. Savage admitted that he advised them that he had "a possible suspect." Tr. at 13. Moreover, Henderson testified that she was called because "they [thought] they had the guy that robbed us." *Id*. at 150. Savage stated that the urgency of having a "felon who had committed an

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[7]It is not clear why the Baltimore City Police Department has eschewed adoption of the Department of Justice guidelines on identification procedures. *Eyewitness Evidence: A Guide for Law Enforcement.* The Attorney General's full report is available on the World Wide Web at http://www.ncjrs.org/pdffiles1/nij/178240.pdf. (visited August 25, 2004).

[8]Savage testified that he likes to place a suspect's photo in "position number two" because two is his lucky number. *Id*. at 13.

armed robbery with a handgun" justified asking the women to report to Western District in spite of the late hour. *Id*. at 65.

Morgan arrived at the station first. The detectives showed her the photo array at about 9:00 p.m. *Id*. at 66, 207. Morgan identified Wooten as the man who robbed her. Savage told her she did a "good job." *Id*. at 18, 193. Then, at Savage's request, Morgan drove across the city to Henderson's home, picked up Henderson, and returned to the police station. Morgan testified that she and Henderson did not discuss the robbery or her prior identification. *Id*. at 90, 117-19. However, Henderson testified that when Morgan called to arrange to pick her up, she told Henderson that the police "think they caught the guy that robbed us," were "going to show [Henderson] some photos," and that she had picked the robber out of the photo array. *Id*. at 152, 157-58. Like Morgan, Henderson then identified Wooten from a six-photo array. The court finds that Morgan and Henderson did discuss the identification process during the drive to the Western District police station.

After the photo array procedure, Morgan and Henderson told each other that they had identified the robber from the photo array and agreed that he "looked like Donald Duck." *Id*. at 166-67. At some later point, Morgan received documents from the state's victims assistance program that included Wooten's name. She also attended at least one state court proceeding involving Wooten prior to the case being transferred to federal court and she observed Wooten at that proceeding. *Id*. at 166-67, 83-84, 120-21, 122-23.

II. Conclusions of Law

Morgan's Out-of-Court Identification of Wooten

(1) "In challenging an identification procedure, [defendant] must prove that the identification procedure was impermissibly suggestive." *Holdren v. Legursky*, 16 F.3d 57, 61 (4th Cir.) (citing *Manson v. Brathwaite*, 432 U.S. 98 (1977)), *cert. denied sub nom. Holdren v. Trent*, 513 U.S. 831 (1994). "Once this threshold is crossed, the court then must determine whether the identification was nevertheless reliable under the totality of the circumstances." *Id*.

(2) "Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Neil v. Biggers*, 409 U.S. 188, 198 (1972). Taken together, the following aspects of Morgan's out-of-court identification of Wooten rendered the identification unnecessarily suggestive:

A. The detective's evening phone call asking Morgan to come to the Western District police station that evening because he thought he had "a possible suspect," Tr. at 13, after Morgan had reviewed a different photo array earlier that day, improperly conveyed Savage's admitted sense of "urgency" and the likelihood that the police believed they had the man who committed the robbery and that his photograph would be among those that would be shown to Morgan. *United States v. Wiseman*, 172 F.3d 1196, 1208, 1209 (10th Cir.) (stating that imparting information to witnesses as to whether or not the suspect is in

custody is "highly suggestive"), *cert. denied*, 528 U.S. 889 (1999).

B. The photo array contained only six photographs, *United States v. Sanchez*, 24 F.3d 1259, 1263 (10th Cir.) ("The lower the number of photographs used by officers in a photo array, the closer the array must be scrutinized for suggestive irregularities."), *cert. denied*, 513 U.S. 1007 (1994); *Wiseman*, 172 F.3d at 1209 (stating that the "low number of photos" did not dilute the photo arrays' "suggestive irregularities").

C. Wooten's computer file photo depicted Wooten with a noticeably darker complexion than the rest of the photographs used in the arrays, and this was done even though the detective who constructed the arrays had Wooten in custody at the time of the identification procedures and well knew that Wooten's skin complexion was depicted inaccurately in the photo he selected for use in the arrays. *Id*.

(3) If the identification results from an improperly suggestive procedure, the next question is whether under the "totality of the circumstances" the identification was reliable. *Neil,* 409 U.S. at 199. "[T]he factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation." *Id*.

(4) The totality of the circumstances surrounding the identification at issue here does not remotely overcome the unnecessary suggestiveness surrounding Morgan's out-of-court identification of Wooten. Although Morgan testified that she spent several hours in

close proximity to the robber in the Roots Bar (several bar stools away from where she was sitting) on the night of the robbery, she provided a *de minimis* description of the robber ("an unknown black male wearing a blue sweatshirt") to the responding police officer.[9] Furthermore, although Morgan claims to have had only one or two drinks during the evening, she had a significant bar tab upon her departure. Moreover, at the time of the crime, Morgan was on her cell phone and the robber held the gun to the side of her head, making it unlikely that she could have seen the robber's face. Finally, while only a few days passed between the time of the crime and the identification, it is significant that Morgan did not contact the authorities with any additional information about the suspect during that time period. These factors, which in the aggregate point decidedly toward the unreliability of Morgan's identification of Wooten as the man who robbed her, are not outweighed by Morgan's later certainty about the identity of her attacker.[10]

(5) Because the identification was unduly suggestive and the totality of the circumstances do not overcome the improper photographic identification, the out-of court-

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[9]It is remarkable that, despite the fact that she allegedly spent several hours in the Roots Bar very near the person who robbed her, Morgan could not have observed, and indeed failed to report to the responding police officer, that the robber resembled "Donald Duck."

[10]As the court explained on the record, the entirety of Morgan's testimony was thoroughly impeached during the motion hearing. Nonetheless, the court is cognizant that its role is not to determine whether a reasonable juror could reasonably accept Morgan's identification of Wooten and conclude beyond a reasonable doubt that Wooten committed the robbery; rather, the court's role is to determine whether subsidiary issues relevant to the government's effort to meet its burden of proof to establish the reliability of Morgan's identification of Wooten are informed by Morgan's lack of credibility. In this regard, Morgan's testimony seriously damaged the government's ability to meet its burden of proof.

identification is suppressed.

Morgan's Potential In-Court Identification

(1) An in-court identification may be admissible even if an antecedent out-of-court identification is excluded as tainted, if there exists an independent source for the in-court identification. *United States v. Wade,* 388 U.S. 218, 240-42 (1967); *United States v. Cranson*, 453 F.2d 123, 128 (4th Cir. 1971), *cert. denied*, 406 U.S. 909 (1972); *United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir. 1996), *cert. denied*, 522 U.S. 934 (1997).

(2) Assuming that Morgan would be able to make an in-court identification of Wooten at trial, such an identification would not have an independent source because: (a) after Morgan had selected Wooten's photograph from the array, Detective Savage told her, inappropriately, that she did a "good job;" (b) Morgan was given Wooten's name by the state victim's assistance program; and (c) Morgan saw Wooten in a state court proceeding related to this case prior to the return of the indictment in this case.

(3) The government has not carried its burden of proof to establish that the out-of-court identification by Morgan of Wooten as the man who robbed her was reliable, or to establish that any prospective in-court identification by Morgan of Wooten as the man who robbed her would be free of the taint of the out-of-court identification, or would be otherwise reliable as derived from an independent source. *Manson*, 431 U.S. at 114.

III. Conclusion

For the reasons stated herein and on the record, by separate order, the court shall grant

defendant's motion to suppress eyewitness identification evidence.

Filed: August 27, 2004

/s/
Andre M. Davis
United States District Judge

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O R D E R

For the reasons stated in the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING MOTION TO SUPPRESS IDENTIFICATION EVIDENCE, it is this 27th day of August, 2004, ORDERED

(1) The motion to suppress (Paper No. 9) is GRANTED AND THE EYEWITNESS IDENTIFICATION EVIDENCE INTENDED TO BE OFFERED IN THE TRIAL OF THIS CASE IS SUPPRESSED; and it is further ORDERED

(2) The clerk shall provide a copy of the within FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING MOTION TO SUPPRESS IDENTIFICATION EVIDENCE and this ORDER to all counsel.

/s/
ANDRE M. DAVIS
United States District Judge